



REPUBLIC OF KENYA



KENYA LAW
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**Kongo v Nthuka (Environment and Land Appeal E005 of 2025)
[2025] KEELC 7740 (KLR) (13 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7740 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E005 OF 2025**

AK BOR, J

OCTOBER 13, 2025

BETWEEN

SIMON NJUKI KONGO APPELLANT

AND

JOSEPH MUGO NTHUKA RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of Hon Stephen Ngii, Principal Magistrate (PM) delivered on 23/1/2025 in Siakago MCL&E Case No. E045 of 2023 which the Respondent instituted vide a plaint seeking the transfer of 8 acres from the land known as Mbeere/Giachina/1245 (the suit land). In the alternative, he sought a declaration that he had acquired title over 8 acres of that land through adverse possession and was entitled to be registered as such. He also claimed that he was entitled to a refund of the purchase price to be paid at the current market value as well as costs of the suit.
2. The Respondent's case was that on or about 8/11/2014 he entered into an agreement with the Appellant for the sale of 8 acres out of Mbeere/Giachina/1245 (the suit land) for the sum of Kshs. 244,000/=. He averred that the Appellant promised to transfer that portion to him but failed to do so despite him paying the entire purchase price. He averred that following the agreement, he took possession of the suit land and started cultivating and doing construction thereon. Sometime in 2022, the Appellant tried to chase him from the suit land but he referred the dispute to the area Chief where it was agreed that he would continue occupying the suit land. Efforts to resolve the dispute before the Chief did not bear fruit.
3. The Appellant filed a defence and denied the Respondent's claims. He asked that the Respondent's suit be dismissed with costs to him and in the alternative, that he refunds the purchase price in terms of the agreement to settle the matter.



4. During the hearing, the Respondent testified that he purchased the suit land from the Appellant on 8/11/2014 for the sum of Kshs. 244,000/= which he paid in full. That the Appellant failed to transfer the land to him and recently chased him away from the suit land despite having developed it extensively. He tried to resolve the issue with the Appellant but the Appellant remained adamant and chased him using arrows when any of his family members go to the land. He produced copies of the sale agreement dated 6/11/2014, official search over the suit land and the letter from the Chief.
5. On cross-examination, he stated that the Appellant proposed to refund the purchase price but he was interested in the suit land. He reported the issue to the police who instituted criminal charges but the court's finding was that the case was civil in nature and dismissed it.
6. The Respondent called his son, Nicasio Muriithi Mugo, to testify. He told the court that his father showed him the suit land after purchasing it from the Appellant. After the land was surveyed, they were shown the boundaries and he started clearing bushes so he could start cultivating. However, the Appellant chased him away armed with bows and arrows and the Appellant had not allowed them on the land again.
7. The Appellant's evidence was that he sold the suit land to the Respondent pursuant to a sale agreement dated 6/11/2014, for the sum of Kshs. 244,000/= which he paid in full by 2015. After completing payment, the Respondent brought his own surveyor to the land without notifying him and when he questioned him about it, the surveyor said he was only showing the Respondent where he would stay pending release of the title deeds. He informed the Respondent that he would engage his own surveyor to verify the measurements, which the Respondent agreed to.
8. Two weeks later, the Respondent began marking boundaries on the land and when he asked him to stop until his own surveyor could establish the boundaries, he claimed that the Respondent threatened to kill him or burn him and his wife with petrol. He reported the matter to the Assistant Chief, John Njeru Mbenji in 2016, who warned the Respondent to stop threatening him but the Respondent insulted him calling him useless, after which the Assistant Chief closed the case. That a month later, the Respondent went to his home with three other people at night and the next morning, he found their footprints near his gate. Around the same period, his wife, Teresia Kago Njuki, fell ill and was treated at Embu General Hospital and Kenyatta National Hospital. She was sick for three years until she died.
9. He claimed that before dying, his wife told him to sell part of the land and refund the Respondent's money so that he could leave their land. He added that his wife left a curse on him to refund the Respondent's money. After her death, the Respondent reported him to the Chief demanding the suit land. He offered to refund the money instead, but the Respondent refused insisting to be given the land. He maintained that the suit land belongs to him and that he was willing to refund the Respondent's money but not surrender the land.
10. On cross-examination, he stated that he did not transfer the suit land to the Respondent because they differed on survey or subdivision process. He stated that he was present during the survey and that he asked the Respondent to give him time to resolve the issue through an open and transparent process but he declined. He was also angered by the Respondent's threats to kill him and his wife.
11. In its judgment, the trial court noted that Magistrates courts did not have jurisdiction anymore to entertain claims for adverse possession and struck out the Respondent's second prayer in the plaint. The trial court found that the Respondent had adduced credible evidence demonstrating that he performed his obligations in full under the sale agreement by paying the entire purchase price, a fact admitted by the Appellant in his defence and testimony. The court held that the Appellant's belief that



he could not transfer the land due to an alleged curse pronounced by his late wife had no legal basis in the law of contract and could not serve as a ground to rescind or void the agreement.

12. It was further observed that the Appellant had placed the Respondent in possession of the suit land, and as such no difficulty was anticipated in effecting transfer. The court also noted that the Appellant's counsel's argument that the Respondent had breached the agreement was unsupported by the pleadings, as no such allegation appeared in the defence. The court concluded that the Respondent had proved his case on a balance of probabilities and directed the Appellant to transfer the suit land to him. The court also condemned the Appellant to pay the costs of the suit with interest from the date of assessment until payment in full.
13. Being aggrieved by that decision, the Appellant raised six grounds in the memorandum of appeal. He faulted the trial court for ordering him to transfer the suit land to the Respondent against the weight of the evidence, and for relying on a sale agreement which in his view had become void for failure to obtain the Land Control Board (LCB) consent. He also faulted the court for failing to find that the Respondent had agreed to be refunded the consideration after the sale agreement became void and for failing to find that the agreement had been drawn by an unqualified person. He invited the court to allow the appeal and set aside the judgment of the trial court.
14. The appeal was canvassed through written submissions. The Appellant submitted that the Learned Magistrate erred in law and fact by allowing a claim for specific performance and that the court failed to properly inform itself on when specific performance should be granted. He reiterated that the Respondent had agreed to be refunded the purchase price, and that the transaction became null and void since the requisite LCB consent for subdivision and transfer of the 8 acres was not sought within six months as required under Section 6(1) of the [Land Control Act](#). That since no such consent was obtained, the order for specific performance was erroneous.
15. Further, that the terms of the agreement provided that if he failed to honour the agreement, he would refund the purchase price and that the intention of the parties therefore was for a refund and that by ordering specific performance, the court effectively rewrote the contract contrary to law. He urged that the sale agreement which the Respondent relies on was drawn by the Chief, who is not a qualified person to prepare a land sale agreement, rendering it unenforceable.
16. He submitted that the Learned Magistrate relied on unsubstantiated evidence, wrongly stating that he admitted receiving the full purchase price, yet there was no such admission or documentary proof of full payment. He contended that the trial court disregarded his evidence that the parties had agreed to refund the purchase price and that he rescinded the agreement after the Respondent threatened to kill him and his wife. In his view, the only recourse available to the Respondent was recovery of the purchase price not specific performance.
17. The Respondent submitted that it was not in dispute before the trial court that he performed his part of the bargain. He submitted that the Appellant stated during trial that he could not transfer the suit land because the Respondent brought a surveyor to the suit land without his notice and that his late wife was angered by the Respondent's actions and cursed him were he to transfer the land to the Respondent. He emphasised that the evidence adduced supported the order for specific performance as the trial court ordered.
18. On the validity of the sale agreement, he submitted that the Appellant's allegations that the agreement was void for want of LCB consent and that it was drawn by an unqualified person were being raised for the first time on appeal and that those grounds of appeal raised new issues which were neither in the pleadings nor raised during the trial, and reiterated that parties are bound by their pleadings. He submitted that no agreement was produced to show that the previous agreement had been revoked



and a new one providing for a refund entered into. He urged that the appeal should be and that it was largely premised on new facts introduced for the first time on appeal and outside the pleadings and evidence at trial.

19. The issue for determination is whether the appeal has merit. It is not in dispute that the Appellant sold 8 acres out of Mbeere/Giachina/1245 to the Respondent and received the full purchase price. The Appellant admitted this fact in his evidence. The Appellant's main contention is that the agreement became void for want of LCB consent as required under Section 6(1) of the Land Control Act and that the trial court erred in ordering specific performance of a void contract. The record shows that the issue of lack of LCB consent was neither pleaded nor raised before the trial court and cannot be introduced on appeal. The same goes for the contention that the agreement was prepared by an unqualified person. No objection was raised to the production of the sale agreement and the Appellant expressly acknowledged its existence.
20. This court agrees with the trial court that the Appellant's justification for failing to transfer the suit land to the Respondent, was because they disagreed on the survey process and that his wife cursed the arrangements legally untenable and cannot vitiate an otherwise valid and enforceable agreement. The trial magistrate correctly found that the Respondent had proved his case on a balance of probabilities and that the Appellant breached the contract. The order for specific performance was properly granted.
21. The court finds no merit in the appeal and dismisses it with costs to the Respondent.

DELIVERED VIRTUALLY AT EMBU THIS 13TH DAY OF OCTOBER 2025.

K. BOR

JUDGE

In the presence of: -

Ms. Mutegi Emies for the Appellant

No appearance for the Respondent

Court Assistant- Diana Kemboi

